84-401

No. 84-104

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROSEBROUGH MONUMENT COMPANY,
Petitioner,

vs.

MEMORIAL PARK CEMETERY ASSOCIATION, a corporation, VALHALLA CEMETERY, CREMATORY and MAUSOLEUM COMPANY, a corporation; LAKE CHARLES MEMORIAL PARK, INC., a corporation; ALEXANDER & SONS, INC., a corporation, d/b/a MT. LEBANON CEMETERY and MAUSOLEUM; LAKEWOOD PARK CEMETERY, INC., a corporation; SUNSET BURIAL PARK, INC., a corporation; STANZA & COMPANY, INC., a corporation, d/b/a OAKGROVE CEMETERY; LAUREL HILL MEMORIAL GARDENS, INC., a corporation; MASON SECURITIES COMPANY, d/b/a HIRAM CEMETERY; MT. HOPE CEMETERY and MAUSOLEUM COMPANY, a corporation; SOUTHERN SECURITIES COMPANY, a corporation, d/b/a PARK LAWN CEMETERY,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, a seller of grave monuments and markers, sued Respondent cemeteries under the Sherman Act, seeking a recovery under 15 U.S.C. §§15 and 26 of $3,300,000 in treble damages and an injunction. Petitioner challenged, as a tying arrangement and conspiracy, rules of the various cemeteries which required that the cemeteries themselves prepare the foundations for monuments and markers to be placed therein.

Much of Petitioner's counsel's pre-trial preparation, and much of its effort at trial, was devoted to its attempt to prove

the damage claim. Petitioner conducted lengthy inspections of the books and records of the eleven cemeteries, and retained an outside expert accountant to prepare its damage theory. Much of the trial time was devoted to Petitioner's attempts to prove its damages calculations, which totalled at trial $269,554. This was the total of thirty-three separate calculations, with a separate calculation applicable to each of the eleven Defendant cemeteries.

After a non-jury trial, the District Court found that the cemeteries' rules on the subject of foundation preparation did not violate the Sherman Act, and entered judgment for Respondent cemeteries. On the damage issue, the court found Petitioner's evidence to support damages to be "incredible" and rejected Petitioner's damage claims as "wholly speculative." *Rosebrough Monument Co. v. Memorial Park Cemetery Association,* 505 F.Supp. 525, 530 (E.D.Mo. 1980).

On appeal by Petitioner, the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. *Rosebrough Monument Co. v. Memorial Park Cemetery Association,* 666 F.2d 1130 (8th Cir. 1981). The Court of Appeals, relying heavily on a prior Ninth Circuit decision, found that the challenged cemetery rule was an unlawful tying arrangement. The Eighth Circuit accepted, however, the findings of the District Court that Petitioner had totally failed to satisfy its burden of proof on the amount of damages. The Eighth Circuit determined that Rosebrough was entitled only to $1.00 in nominal damages, trebled to $3.00.

The cause was remanded to enter judgment in this amount, to fashion an injunction, and to determine Petitioner's reasonable attorney fees and costs pursuant to 15 U.S.C. §§15 and 26. An injunction was then issued and modified slightly on appeal. The scope of that injunction is not now before this Court.

On remand after the first Eighth Circuit opinion, the District Court considered the question of attorney fees. Petitioner's counsel testified that he and attorneys in his firm had charged

1,432.05 hours to the case, and had billed and collected from Petitioner $102,587.90. Based on his records, he could not segregate those hours devoted to the damages issue as distinct from other issues in the case. The District Court determined that it would not award the $102,587.90 sought because of Petitioner's limited success in obtaining the relief it sought.

The District Court said:

> There is no question that the injunctive relief sought was a substantial objective and that the relief obtained was virtually complete. By contrast, Plaintiff recovered insignificant damages, through trial and appeal, after expending enormous efforts to prove its claim of well over $3,000,000. Accordingly, this court will award as attorneys fees that amount which is reasonable in relation to plaintiff's success on the issue of injunctive relief, and its failure on the issue of damages. The court finds that amount to be Fifty-One Thousand Two Hundred Ninety-Three and Ninety-Five Cents ($51,293.95). (Appendix to Petition at A-20).

In placing this emphasis on the extent of the overall relief attained by Petitioner, the District Court expressly relied on this Court's opinion in *Hensley v. Eckerhart*, ____ U.S. ____, 76 L.Ed.2d 40 (1983). The District Court correctly pointed out that in *Hensley* this Court "emphasized repeatedly that the degree of success obtained is the crucial factor." (Appendix to Petition at A-19).

The Court of Appeals affirmed the attorney fee award, finding no abuse of discretion. The Eighth Circuit said, "In the present case the district court, which presided over the litigation, was in the best position to evaluate the time and resources expended on appellant's unsuccessful attempt to prove its measure of damages. We find no error or abuse of discretion in the district court's reduction of the attorney's fee award by one-half to account for appellant's failure to obtain any significant money damages." *Rosebrough Monument Company v.*

Memorial Park Cemetery Association, No. 83-2351 (June 14, 1984), Appendix to Petition at A-10.

Petitioner now seeks review by certiorari of the Eighth Circuit's affirmance of the $51,293.95 fee award.

ARGUMENT

I. This Is A Routine Attorney Fee Award Case, In Which The Two Lower Courts Properly Applied The Governing Standard Of *Hensley v. Eckerhart.*

In deciding *Hensley v. Eckerhart, supra,* this Court surely did not intend to make itself the final arbiter of all routine attorney fee disputes. Rather, the task of setting a reasonable fee, where a statutory right to a fee is present, rests principally with the District Court. The District Court's fee award is reviewable in the Court of Appeals on an abuse of discretion standard. *See Hensley v. Eckerhart, supra,* ____ U.S. at ____, 76 L.Ed.2d at 50. That is precisely what occurred here.

The District Court took as the touchstone of its analysis the central point of *Hensley v. Eckerhart:*

> But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Hensley v. Eckerhart, supra, 76 L.Ed.2d at 55. The District Court recognized that the extent of Petitioner's success in the case at bar was indeed limited. Petitioner obtained only an injunction and nominal damages, not the $3,000,000 damage award it had sought. It was impossible, on the basis of the records presented, to allocate Petitioner's attorney fees between the damages and injunction claims. The District Court therefore determined to halve the attorney fees claimed, in recognition of Petitioner's limited success. The Court of Appeals affirmed this decision as a proper exercise of the District Court's discretion. The opinions below thus represented a routine and proper application of the *Hensley* standards to this factual situation.

II. There Is No Conflict Between The Lower Court Decisions In This Case And *Hensley v. Eckerhart;* Likewise, There Is No Inter-Circuit Conflict Here.

To justify the grant of certiorari, Petitioner attempts to manufacture conflicts between the lower court opinions in the case at bar and *Hensley v. Eckerhart.* It also attempts to portray an inter-circuit conflict, which is in fact non-existent.

A. Hensley v. Eckerhart.

Petitioner argues that the *Hensley* rationale is applicable only where the Plaintiff is unsuccessful on one or more of several claims, and the unsuccessful claims are not related to the successful claims. *Hensley,* however, clearly contemplates reduction of the attorney fee award to a Plaintiff who obtains limited relief, regardless of whether his claims are related to one another or not.

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. *But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.*

Hensley v. Eckerhart, supra, [illegible]L.Ed.2d at 54 (emphasis supplied). The clear implication of this language is that a fee reduction in light of limited success is appropriate in any case, including one where the Plaintiff's claims are related.

Petitioner argues that *Hensley* requires a fee award in the full lodestar amount where an injunction is granted but damages are denied. In fact, the *Hensley* opinion clearly permits a fee reduction in such a case: "For example, a plaintiff who failed to

recover damages but obtained injunctive relief, or vice versa, may recover a fee based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Hensley v. Eckerhart, supra,* 76 L.Ed.2d at 52, n.11. In the case at bar, the lower courts determined that the relief obtained did not justify the expenditure of attorney time, and reduced the fee award accordingly. This is entirely consistent with *Hensley.*

There is no purpose to Petitioner's semantic argument that a claim for injunctive relief and a claim for damages are a single "claim" for *Hensley* purposes. The ultimate question, which the lower courts answered correctly, is this: Do the results obtained justify the time expended? If they do not, as they did not in the case at bar, the "lodestar" amount must be reduced.

B. **Inter-Circuit Conflict.**

Petitioner attempts to manufacture inter-circuit conflicts by citing two decisions of other circuits. The first is *Greenhaw v. Lubbock County Beverage Association,* 721 F.2d 1019 (5th Cir. 1983). Contrary to the assertion in the Petition for Certiorari (see Petition at 10), the Fifth Circuit did not there hold that *Hensley* is inapplicable to antitrust cases. Rather, the Fifth Circuit expressly applied *Hensley* to the antitrust case before it. The Court determined that, under *Hensley,* certain minor reverses suffered by the Plaintiff did not mandate a reduction of the fee award on the facts of that case. *See Greenhaw v. Lubbock County Beverage Association, supra,* 721 F.2d at 1032. Thus, like the Eighth Circuit in the case at bar, the Fifth Circuit applied *Hensley* standards in an antitrust case. The Third Circuit has done the same. *See Danny Kresky Enterprises Corp. v. Magid,* 716 F.2d 215 (3rd Cir. 1983). Petitioner has shown no inter-circuit conflict on this point.[1]

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[1] It is not surprising that the standards in *Hensley,* a civil rights case decided under 42 U.S.C. §1988, should be applied in antitrust cases. The Senate Committee which drafted the relevant amendment to 42

Petitioner's second attempt to create an inter-circuit conflict is based on *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983). There is, however, no difference between the legal standard applied by the Seventh Circuit in that case and the standard applied by the Eighth Circuit in the case at bar; both recognized the *Hensley* emphasis on "the relationship between the extent of success and the amount of the fee award." *See Mary Beth G. v. City of Chicago, supra,* 723 F.2d at 1281. The Seventh Circuit merely held that, on the facts before it, the extent of the Plaintiff's success did not warrant a reduction in the fee. In the cas at bar, on substantially different facts, the Eighth Circuit affirmed a reduction of the fee by the District Court. This is not an inter-circuit conflict so as to require this Court's exercise of its certiorari jurisdiction.

The decisions below stand for a simple proposition: In fixing the amount of a reasonable attorney fee in an antitrust case, results count. If the plaintiff falls far short of the relief he seeks, the District Court may consider this in fixing a reasonable fee. This is not a new doctrine. It is wholly consistent with *Hensley.* It was in fact the law in the antitrust area long before *Hensley. See, e.g. Twentieth Century-Fox Film Corporation v. Brookside Theatre Corp.,* 194 F.2d 846 (8th Cir. 1952) (reducing the attorney fee award by one-third, in large part because the award was disproportionately large when compared to the actual damages recovered); *Morning Pioneer, Inc. v. Bismarck Tribune Company,* 493 F.2d 383 (8th Cir. 1974) (listing the amount recovered as one factor to be considered in fixing antitrust attorney fees); *Phillips v. Crown Central Petroleum Corp.,* 602 F.2d 616 (4th Cir. 1979) (ordering fee reduction

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U.S.C. §1988 stated its intention that "the amount of fees awarded under S. 2278 [amending §1988 to allow attorney fees] be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases...." S.Rep. No. 94-1011, 94th Cong., 2nd Sess. 6, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5913.

where damages are reduced on appeal); *Bowl America Incorporated v. Fair Lanes, Inc.*, 299 F.Supp. 1080, 1100 (D.Md. 1969) (reducing Plaintiff's attorney's fee claim by more than half where the attorney spent much time attempting to prove damages he was unable to prove). In light of this settled law, Petitioner's limited success clearly justified the District Court's exercise of its discretion in reducing the fee award in the case at bar.[2]

The lower courts applied settled principles to reach a result that was entirely just and within their discretion. This is not an appropriate case for certiorari.

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[2] Petitioner argues that he was denied all fees under 15 U.S.C. §15, because the only fees awarded were under 15 U.S.C. §26. In fact, there was a single fee award encompassing the entire lawsuit, which award was properly limited in light of Petitioner's limited overall success.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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